DOMINIC CHIN JOON SIONG

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-02-99-II]
15 OCTOBER 2001

CRIMINAL PROCEDURE: *Prosecution - Gap in evidence - Whether prosecution proved case beyond reasonable doubt - Whether affidavits adduced established case beyond reasonable doubt - Aviation Offences Act 1984, s. 6*

CRIMINAL PROCEDURE: *Conviction - Misdirection - Overwhelming evidence to justify verdict - Whether conviction amounted to failure of justice - Criminal Procedure Code, s. 422*

The accused was found guilty of an offence under s. 9(2) of the Aviation Offences Act 1984 ('the AOA') for causing to be placed in an aircraft in service a device likely to damage the aircraft.

The ground of appeal here was whether the prosecution had proved its case beyond a reasonable doubt considering the accused's submission that there was a break in the chain of evidence.

The accused argued that the affidavits did not measure up to proof beyond a reasonable doubt (the test in *Arulpragasan Sandaraju v. PP* test) as the deponents were not cross-examined as to what they had said in their affidavits. Counsel referred to *Arulpragasan* in which it was held that the prosecution must at the end of its case make out a case beyond all reasonable doubt and that such a standard called for a maximum evaluation of the evidence and a more rigorous test of credibility instead of a minimal evaluation as laid down in *Haw Tua Tau v. PP*.

Held:

[1] Since s. 6 of the AOA was enacted by Parliament, *Arulpragasan* must be read subject to the requirements of s. 6 when it concerns a case under the AOA. In fact, *Arulpragasan* must be read subject to what any written law has provided for. Therefore, since s. 6 allows affidavit evidence to be accepted, it necessarily means that in respect of offences under the AOA, the standard of proof is met when the necessary affidavit is admitted by the court as evidence after evaluation. (p 650 d-f)

[2] The court below had misdirected itself when it accepted the statements in the affidavits as true merely because the accused did not apply to have the deponent called as a witness and because he did not refute the statements or facts in the affidavits. The prosecution bore the burden of proving the facts stated in the affidavits as being true and that burden was not satisfied by the silence of the accused. (p 652 d-g)

[3] Although the lower court had misdirected itself, the evidence adduced was so overwhelming that the verdict in the case could only be one of guilt. (p 658 c)

[Appeal dismissed.]

Case(s) referred to:
Adlan v. PP [1965] MLJ 142 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(foll)***
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(refd)***
Haw Tua Tau v. PP [1981] CLJ 123; [1981] CLJ (Rep) 11 ***(refd)***
Ishak Shaari v. PP [1997] 3 CLJ 223 ***(refd)***
Khoo Hi Chiang v. PP And Another Appeal [1994] 2 CLJ 151 ***(refd)***
Kwan Bong & Anor v. R [1979] AC 609 ***(refd)***
Lim Sing Hiaw v. PP [1965] MLJ 85 ***(foll)***
PP v. Mansor Mohd Rashid [1997] 1 CLJ 233 ***(refd)***
R v. Cohen & Bateman 2 Cr App R 197 ***(refd)***
Re Tan Boon Liat & Anor et al [1997] 2 MLJ 108 ***(refd)***
See Yew Foo v. PP [1949] MLJ 130 ***(refd)***
Su Ah Ping v. PP [1980] 1 MLJ 75 ***(refd)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 ***(refd)***
Yap Sing Hock v. PP [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 ***(foll)***

Legislation referred to:
Aviation Offences Act 1984, ss. 6(1), 9(2)
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, s. 422

Other source(s) referred to:
Bindra, *Interpretation of Statutes,* 8th edn, p 194

For the appellant/accused - Karpal Singh (Anthony Bong); M/s Karpal Singh & Co
For the respondent/prosecution - Kamarulzaman Abd Jalil DPP

Reported by Mariette Peters-Goh

JUDGMENT

Ian HC Chin J:
On 18 November 1998 Dominic Chin Joon Siong (the appellant) was found guilty of the following charge:

That you, on the 24th day of October, 1996 at about 9.30 p.m at Kuching International Airport, in the district of Kuching, in the State of Sarawak, did unlawfully and intentionally cause to be placed in an aircraft in service, to wit, Transmile Air Flight No. TH731 leaving Kuching Airport on the 24.10.1996 at about 10.50 p.m. arriving at Kuala Lumpur International Airport on 25.10.1996 at about 12.10 a.m. a device which is likely so to damage the aircraft as to be likely to endanger its safety in flight and that you had thereby committed an offence under section 9(2) of the Aviation Offences Act 1984 and punishable under section 14 of the same Act.

He was sentenced to ten years' imprisonment. Hence this appeal. The principal and only ground of appeal (after abandonment of the others) concerns the question of whether the prosecution had proved their case beyond reasonable doubt. The appellant said the prosecution had failed to do so due to a break in the chain of evidence which the six affidavits which the court had admitted as evidence and which the prosecution had relied on to establish the chain of evidence could not be relied on as the deponent of the affidavits could not be cross-examined. A little of the evidence will be stated for a better understanding of that contention.

The appellant was engaged to a girl who was the cousin of Kueh Hui Mei ("Kueh") until he became infatuated with Kueh about December 1995 after some social intercourse. The infatuation manifested itself in phone calls, cards and letters to Kueh who revealed them to her cousin. The cousin's mother collected the letters and cards. Not unexpectedly the cousin decided to break the engagement to marry the appellant. The cousin then went to New Zealand to further her studies in February 1996. A few days after the cousin's arrival to New Zealand, the appellant also went there to persuade the cousin not to break the engagement and said that he would not forgive Kueh. The cousin stood by her decision and the annulment of the engagement was published in the newspaper with the consent of the appellant sometime in April 1996. Several months passed before Kueh, on 29 October 1996 and while in Wellington, New Zealand, received a card from the post office informing her of a parcel that awaits her collection. She went with a friend called Ken Kok and collected the parcel which she unwrapped while in a car that was driven by Ken Kok. It was while she was unwrapping the parcel that it exploded in her face and she and Ken Kok were burnt. Ken Kok drove to the hospital to seek treatment. The parcel bore a bar code number from which number the origin of the parcel was traced to Kuching where it was received for posting from a person who could not be identified. Evidence was led as to how the parcel was placed in a bag and sealed, then flown to Kuala Lumpur and from there to Sydney. The bag was thereafter put on an aircraft bound for Auckland, New Zealand. The events following were then covered by an affidavit of Kerry Burgham, a senior processing officer with the New Zealand Post International

Mail Centre, Auckland, New Zealand, who said he, on 27 October received the bag that came in from Sydney. He deposed that he sent the bag to the processing section. It is this affidavit and five others as well which will be referred to later which the appellant contends cannot be evidence that establish beyond reasonable doubt the chain in the custody of the evidence as to dispel any possibility that the parcel could have been tampered with.

The affidavits were received in evidence pursuant to s. 6(1) of the Aviation Offences Act and it reads:

> 6.(1) Where in any proceeding before a court in Malaysia for an offence committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in Malaysia, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding previously made on oath by that person:
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> (a) in Malaysia which was so made in the presence or absence of the person charged with the offence and before a President of a Sessions Court or Magistrate; or
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> (b) outside Malaysia which was so made in the presence or absence of the person charged with the offence and before a consular officer or a judicial officer of any foreign country.
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> (2) Any such deposition shall be authenticated by the signature of the President of a Sessions Court, Magistrate, consular officer or judicial officer before whom it was made who shall certify that the person charged with the offence was present or absent at the taking of the deposition.
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> (3) ... (4) ... (5) ...

Clearly, by that section the depositions, in this case in the form of affidavits, are to be admitted as evidence. Mr. Karpal Singh contended that Parliament, when it passed the Aviation Offences Act, would not have included s. 6 if it had not been under the misconception, then prevailing and which many years later *Arulpragasan a/l Sundaraju v. PP* [1996] 4 CLJ 597 had corrected, that a *prima facie* standard of proof was required instead of the standard of proof beyond reasonable doubt. Therefore, contended learned counsel, since there is an error of law or fact in that Act this court can reject s. 6 and thus rendering the affidavits inadmissible as evidence. Hence, a break in the chain of evidence regarding the parcel. Learned counsel referred to Bindra's *Interpretation of Statutes*, 8th edn., p. 194 where it says:

> (iii) Correction of mistakes where permissible. – A court of law is no doubt not authorised to supply a *casus omissus* or to alter the language of a state for the purpose of supplying a meaning, even though they may be of opinion that a mistake has occurred in drawing up the Act, but it is an equally

> recognised principle of interpretation that where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsmen's unskilfulness or ignorance of the law except in case of necessary or the absolute intractability of the language used. On this principle words in a statute may be added, altered or even rejected according to the requirements of the case. When there is an error of either of law or fact contained in a statute, their Lordships of the Privy Council unequivocally affirmed the discretion which is reserved to the judge in such a case.

The contention of the appellant was premised on the supposition that the legislators had the standard of proof in mind rather than the inconvenience, expense or reluctance of witnesses coming to Malaysia which clearly cannot be the case as it is evident that the legislators, by the words of s. 6, were only concerned with the latter. It is clear that it does not matter to the legislators what the standard of proof then was as the legislators wanted depositions of witnesses who are not in Malaysia to be admissible as evidence obviously to avoid the expense or convenience of getting the witnesses to come to Malaysia or to avoid not getting the witness at all due to their reluctance to come to Malaysia. Then again, where is the evidence to say that it should matter? Surely not on the court decision of 1997 which will be hindsight which the then legislators would not have. It must be remembered that there is a presumption against any mistake in an Act of Parliament (*Bindra, supra,* at. 193) and this presumption cannot be displaced by the mere conjecture resulting from a 1997 court decision that the legislators would not have in 1984 passed s. 6. Less so when, as I have said, the legislators were only concerned with procuring evidence of overseas witnesses, irrespective of the then prevailing standard of proof. Therefore, the court must regard the affidavits as evidence.

The appellant then argued that the affidavits do not measure up to proof beyond reasonable doubt as the deponents were not cross-examined as to what they have said in the affidavits. Learned counsel referred to *Arulpragasan* which held that the prosecution must at the end of its case make out a case beyond all reasonable doubt, that such a standard calls for a maximum evaluation of the evidence and a more rigorous test of credibility instead of minimal evaluation laid down by *Haw Tua Tau v. PP* [1981] CLJ 123; [1981] CLJ (Rep) 11. How should, then, the affidavit be looked at in order to satisfy the requirement of maximum evaluation? Mr. Karpal Singh argued, as mentioned earlier, that unless the deponent was called and examined as to his affidavit, the affidavit by itself cannot be accepted as evidence beyond all reasonable doubt. But that argument went against the express wishes of the legislators that the affidavit should take the place of the deponent's oral evidence in court and, therefore, no examination of the witness would arise. Learned counsel had referred to cases concerning drug trafficking where the court had held that the custody of the exhibit must be shown to have an

unbroken chain with witnesses called to testify as to its every movement and custody. But in all those cases, there is no similar law as s. 6 which allows for deposition evidence and therefore they are not relevant because they did not deal with a situation where a law allows affidavit to be admitted as evidence. Of course, what is said in the affidavit cannot simply be taken as evidence beyond all reasonable doubt as to what is stated there; every statement has to be evaluated and weighed against the other evidence of the prosecution to determine its truth or otherwise. Take for example, if there is a statement in the affidavit to say that the deponent saw someone posted the parcel in Kuching when he was not in Kuching at all; surely, that statement cannot be accepted by the court as evidence at all of the posting. Mr. Kamarulzman bin Ab. Jalil, deputy public prosecutor, had argued that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence regarding an exhibit unless there is a doubt as to its identity (*Su Ah Ping v. PP* [1980] 1 MLJ 75 FC) or unless it was alleged that the exhibit was meddled with (*PP v. Mansor bin Mohd Rashid* [1997] 1 CLJ 233). Those cases were decided before *Arulpragasan* and it remains to be considered whether they have in any way been affected by the requirement of proof beyond reasonable doubt that *Arulpragasan* had laid down. Since s. 6 was enacted by Parliament, *Arulpragasan* must be read subject to the requirement of s. 6 when it is a case under that Act. For that matter, the case must be read subject to what any written law has provided. Therefore, since s. 6 allows affidavit evidence to be accepted it necessarily means that in respect of offences under the Aviation Offences Act, the standard of proof has been met when the necessary affidavit had been admitted by the court as evidence after evaluation. In this regard, bereft of the opportunity of cross-examination, it is only possible for the defence at the prosecution stage of the case to argue with regard to the affidavit evidence produced how incredible they are either by reference to the affidavit itself or by reference to the other evidence adduced by the prosecution. The question to be answered is therefore whether there is any reasonable doubt as to the truth of what is stated in the affidavit. For the purpose of evaluation, what is said in the affidavit of Kerry John Burgham is reproduced here:

1. I am the Senior Mail Processing Officer with the New Zealand Post International Mail Centre, Auckland, New Zealand.

2. I have held this post for the past 20 years.

3. The nature of my duty includes the receiving of mail/parcel bags designated for New Zealand.

4. On 27th, October 1996 at about 1620 hours a consignment of an air freight container arrived from Sydney by Qantas flight QF043.

5. I was responsible for the opening of this air freight container whereby I made a physical check on the seal of each bag and as required I prepared the Checking Sheet form to confirm the numbers of mail/parcel bags that I received.

6. I confirm that a parcel bag under despatch NO: 2190 which was reflected under AV7 form serial NO: 0213258 dated 25th, October 1996 from Kuala Lumpur, Malaysia was received. A certified true photocopy of the AV7 as exhibits "KJB 1" attached.

7. After verifying this said mail bag was in order, it was then kept in our International Mail Handling Unit for safe custody.

8. I confirmed that the particulars of despatch NO: 2190 on this said mail bag was endorsed in my checking sheet form.

9. I personally signed this checking sheet form and a certified true photocopy of this checking sheet form attached as exhibit "KJB 2".

10. The purpose of preparing this checking sheet form is for our records and accounting.

11. This parcel bag was subsequently sent to the Mail Processing Section on the 28/10/96 morning for them to open the parcel bag for its contents to be sorted out.

12. Whilst this parcel was in our custody it did not undergo any security scanning.

13. I have no knowledge of the contents of the said mail/parcel bag despatch NO: 2190.

The deponent said he received the bag sealed after it arrived from Sydney. Mr. Karpal Singh did not say in what respect there should be a reasonable doubt as to the truth or the fact stated there. The deponent there had stated facts which ruled out any possibility of the parcel in the bag being tampered as the seal of the bag was still intact when the deponent attended to the bag. No doubt could be entertained that the parcel in the bag had not been tampered with. It is difficult to entertain any doubt at all when one considers the evidence that the opening of the parcel will trigger a mechanism that results in setting the parcel ablaze. There should also be no doubt at that stage of the prosecution case that no one in Auckland knows that there is a parcel inside the bag that was addressed to Kueh rendering tampering the parcel not even remotely possible. There should also be no doubt that there was no one in Auckland who wanted to substitute that parcel in the bag with the one that finally reached Kueh to explode or conflagrate in her face; to admit of that possibility is to allow a whimsical doubt which is not a reasonable doubt.

What happened thereafter was that on 28 October Diana Manvel, a senior mail officer, broke the seal of the bag and removed the parcel that originated from Kuching and applied two new bar codes to the parcel before placing it in a bag and despatching it to the Wellington post office. Evidence was then led as to how the parcel was received in Wellington, of the two attempts at delivery and of the parcel being in an un-tampered state despite being handled by several persons. Though only the person who was in charge of the computer that kept track of the parcel was called, the tracking of the parcel by way of scanning of the bar codes on the parcel leaves no doubt at all as to where the parcel was. The computer record also shows the parcel not to have been tampered. It does not admit of any reasonable doubt that the parcel which Kueh collected in an untampered form was the one posted in Kuching as it still bore all the bar code that was applied to it in Kuching and since it also bore the bar codes where the parcel was flown to before its onward journey to the final destination.

It was contended that the lower court had misdirected itself when it accepted the statements in the affidavit as true or as facts merely because the appellant did not apply to have the deponent called as a witness and because the appellant did not refute the statements or facts in the affidavit. In the first place, there is no mechanism under that Act to enable an accused person to have the deponent who made an affidavit under s. 6 called as a witness and any way the deponent is not in Malaysia. Secondly, you cannot regard a fact as proven beyond reasonable doubt merely because the appellant did not refute the statements. Finally, the appellant was in no position to know what actually happened to the parcel during its transit from Kuching to Wellington. The prosecution carries the burden of proving the facts stated in the affidavit as being true and that burden is not satisfied by the silence of the accused. In view of what I have said the lower court had misdirected itself. What is the consequence of such a misdirection? The Court of Appeal had in several cases stated this aspect of the law. In *Harun bin Abdullah v. Public Prosecutor* [1998] 3 MLJ 1 CA, the court held:

> (1) The sessions court judge had misdirected herself when she applied the *prima facie* test. Applying the more stringent reasonable doubt test to the facts of this case on the evidence available, the result would not be the same as no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.
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> (2) Section 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. As the error committed by the learned sessions court judge in

misdirecting herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was not capable of rectification under s. 422 of the CPC (see p 9F–G); *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223 followed.

(3) The proviso was not applicable to the situation in this case as a substantial miscarriage of justice had occurred.

Therefore, not withstanding s. 422 of the Criminal Procedure Code, a misdirection involving "a principle of general importance in the administration of justice" or where there is "a substantial miscarriage of justice" cannot be cured, such as failure to appreciate or to apply the standard of proof as in the case just referred to. The same conclusion was reached concerning the standard of proof in *Surandran a/l Rajaretnam v. Public Prosecutor* [1998] 2 CLJ 207 and it was additionally said that the misdirection "went to the root of the matter".

All the cases were in fact re-stating the law as laid down by a series of cases which Augustine Paul J had set out in *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223, 231. To sum up the authorities, s. 422 of the CPC cannot be invoked where:

(1) there is an illegality, like conducting a trial in a manner other than prescribed by the CPC (*See Yew Foo v. PP* [1949] MLJ 130);

(2) where there is a contravention of strict imperative provisions (*Re Tan Boon Liat @ Allen & Anor et al* [1997] 2 MLJ 108);

(3) there is a breach of the cardinal principle in the administration of justice (*Adlan v. PP* [1965] MLJ 142); and

(4) the irregularity involves the breach of a principle of general importance to the administration of justice like such as the principle that the prosecution carries the burden of proving every ingredient of an offence beyond reasonable doubt (*Yap Sing Hock v. PP* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC; *Kwan Bong & Anor v. R.* [1979] AC 609); and

(5) a substantial miscarriage of justice had occurred (*Harun bin Abdullah v. Public Prosecutor, supra*).

But how do we reconcile those decisions with that of *Khoo Hi Chiang v. Public Prosecutor and Another Appeal* [1994] 1 MLJ 265 FC where the court held:

(1) …

(2) (Per Edgar Joseph Jr SCJ) The duty of the court at the close of the case for the prosecution is to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible, ie, the *Haw Tua Tau* test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

(3) Although the judge applied the wrong test when calling for the defence, the error was of no consequence and did not vitiate the convictions, because even if he had applied the more stringent test, the result would have been the same having regard to the absolutely overwhelming nature of the case of the prosecution. No substantial injustice had actually occurred and the court applied the proviso to s. 60 of the Courts of Judicature Act 1964.

(4) …

It seems to me that from that decision that even where there has been a misdirection regarding the standard of proof it does not follow that the conviction has to be set aside as no substantial miscarriage of justice had occurred. The Federal Court had relied on s. 60 of the Courts of Judicature Act 1964 for its decision and that section says:

> Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Ishak Shaari v. PP did not follow the Federal Court because it was of the view that there is no similar power given to the High Court in the CPC. But, there is in s. 422 of the CPC a proviso which says that no order shall be reversed:

> unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice

The only material difference between that proviso and that of s. 60 is that the word "substantial" is absent from the proviso. But the overriding consideration must surely be whether the misdirection and other acts or omissions had occasioned a "failure of justice" and this is recognised by the Supreme Court in *Yap Sing Hock v. PP* where the proviso was referred to expressly and where the court there held that an irregularity involving a breach of general principle of general importance to the administration of criminal justice amounts to a failure of justice. Perhaps, the only way of distinguishing

Khoo Hi Chiang is that they acted under a proviso which provides for "substantial" failure of justice whereas the word "substantial" is not present in s. 422 and therefore, there need only be a failure of justice and it need not be substantial before a judgment can be reversed. In this regard *Yap Sing Hock v. PP* is more applicable as it deals expressly with s. 422 and not with s. 60. Therefore, relying on *Yap Sing Hock v. PP*, the test is still whether there is a failure of justice. This leads me to consider whether the misdirection of the lower court which I had mentioned earlier had occasioned a failure of justice. None of the cases I had referred to has to deal with the question of the misdirection relating to affidavit evidence. I had earlier gone through the affidavit and had concluded that the chain of custody of the parcel had been proven beyond any reasonable doubt and if the proper direction had been given by the lower court the same conclusion would pertain. I am of the view that *Lim Sing Hiaw v. PP* [1965] MLJ 85, even though it concerns s. 60 of the Courts of Judicature Act, which contains the term "miscarriage of justice", which I consider to be the same as the term "failure of justice" in s. 422 of the CPC, is relevant to the present case. That case had accepted the following passage in the decision in *R. v. Cohen & Bateman* 2 Cr. App. R, 197, 207:

> If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice within the meaning of the proviso.

Therefore, similarly in relation to s. 422 of the CPC, there cannot be any failure of justice if on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty. I would also add that even upon a proper direction, the evidence provided by the affidavit is as I have found, there cannot be a failure of justice. Mr. Karpal Singh had referred to other legislation which I will not bother to mention as I am of the view that they are not relevant for the consideration of the issue at hand.

Returning now to the narration of the evidence, the parcel was finally collected by Kueh on 30 October. Kueh entered the car of her friend Ken Kok and proceeded to open the parcel. The parcel consisted of an outer envelope, an inner envelope, a box wrapped in gift paper and inside which was a taped musical box. It was when Kueh attempted to lift the lid of the musical box that it resulted in an explosion and a flash of intense heat that emanated from the box and burnt her hands. The box was on fire and Kueh threw it to the back of the car while Ken Kok put out the fire. They then went to the hospital in the car with the box at the back of the car. The car was locked when they left it to go inside the hospital. Ken Kok's affidavit confirmed the testimony of Kueh. Here too, the misdirection concerning the treatment of the affidavit as evidence is of no consequence since Kueh had supplied the necessary

evidence regarding the exhibits that were left in the car. She identified all the items which made up the parcel and which were subsequently recovered from the locked car.

The keys to the car were, on the same day, given to Douglas Stuart Baber, then a New Zealand police officer who then handed the same to another police officer Alasdair Macmillan. This is the evidence provided by Douglas Stuart Baber in his evidence. Here again, one cannot think of anything that prevents the assertions in this affidavit from being evidence establishing beyond reasonable doubt the custody of the keys to the car. Alasdair McMillan in his affidavit, among other things, confirmed the receipt of the keys on the same day from Douglas Stuart Baber and he narrated how he secured the place and the car until the arrival of the bomb disposal team to whom he handed the key and he witnessed the opening of the car door by a member of the team. Here again there cannot be any reasonable doubt that the exhibits, as Kueh had left in the locked car, had remained untampered until they were recovered from the car; that was what the affidavit of Alasdair McMillan sought to establish.

Another New Zealand police officer Russell Joseph then came into the picture and he testified how he collected all the exhibits from the car after he got the keys from Alasdair McMillan. The items recovered from the car were:

(1) the box which contained the musical box;

(2) the back of an improvised explosive device which has batteries and wires (a part of the musical box);

(3) the lid of the improvised explosive device (another part of the musical box);

(4) samples of powder;

(5) 32 buck shots;

(6) 4 screws

He testified that by 1996 he had two years' experience in explosives and he explained how the improvised explosive device worked and how it was triggered when the box was opened. He handed the items, together with others recovered from the car which included the gift wrapper to police officer Michael John Sears (Sears) whose affidavit concerning the receipt of the items was also admitted in evidence and who also said he handed the exhibits together with two envelopes to Shelley Radaich, a fingerprint technician. Sears said he got the envelopes from a police officer called John Gaulter who never testified nor deposed any affidavit as from where he got the envelopes. But

on one of these envelopes bore a bar code that was affixed in the Kuching Post Office while the other has the name of Kueh written on it. Kueh identified the envelopes to be the ones that contained the parcel she received and no doubt can be thrown on the exhibits merely because it was not explained how it came to John Gaulter. Sears got the exhibits back from Shelley Radaich and he then handed them over to Peter Wilson for scientific examination. Peter Wilson testified that he received them and handed them over to police officer Ronald Chatt who in turn handed them over to ASP Ahmad Nordin who brought them back to Malaysia and who related the history of the handling of the exhibits.

What are the doubts one can possibly entertain regarding the custody of any of the exhibits? The answer should be attempted only after the rest of the evidence had been stated as an overall appreciation of the evidence is required before it can be said whether there is any reasonable doubt and in what aspect of the case. Thus far, there is no evidence to suggest that it was the appellant who delivered or caused to be delivered the parcel to the Kuching post office. The prosecution had relied on circumstantial evidence.

In New Zealand, fingerprints were lifted from the envelope, the gift wrapper and a piece of particle board which were parts making up the parcel. Fingerprints were also lifted from the Immigration Arrival Card and Immigration Departure Card that bore the name of the appellant as being the person who had used the cards to enter and leave New Zealand, respectively on 9 February and 17 February. Two New Zealander experts in the field of fingerprint, Inspector Andrew Veno and Shelly Radaich, testified that the fingerprints found on the envelope and gift wrapper are similar to those found on the cards. They belong to the same person. In order to establish that those fingerprints belong to the appellant, the Malaysian police officer took fingerprints from the appellant and photographs of them were sent to New Zealand and they were also examined and compared by Shelly Radaich and found them to be similar to the fingerprints found on the envelope, gift wrapper and immigration cards. Inspector Andrew Veno also compared another set of fingerprints taken of the appellant in Malaysia which he received with those found on the envelope and gift wrapper and he was also of the opinion that the fingerprints were similar. In Malaysia, Norsiah Mat Yusof, a document examiner of the Kuala Lumpur Chemist Department, examined and compared the handwriting found on one of the envelopes with those of the various letters, which I referred to earlier and which Kueh had received from the appellant. The document examiner was of the view that the same person penned the letters and the envelope.

Given those evidence concerning the fingerprint and handwritings and the evidence of resentment of the appellant towards Kueh whom the appellant held to be responsible for the breakup of his engagement to her cousin, the lower court was amply justified in concluding that it was the appellant who had posted the parcel in Kuching which found its way to Kueh in Wellington. In arriving at that conclusion, the lower court had gone through the evidence with a microscope and gives its reasons as to why there should not be any reasonable doubt that the exhibits had not been tampered. It went into the impossibility of the exhibits being tampered with so as to plant the fingerprints of the appellant on them when at the time of and subsequent to the explosion of the device in the hands of Kueh, the appellant was not shown to be in New Zealand. Therefore, despite the misdirection of the lower court the evidence is so overwhelming that the verdict in this case can only be one of guilt. This means there has been no failure of justice.

In the premises, the appeal is dismissed. I will now hear argument as to why the appellant should not commence serving his sentence immediately.